



U.S. Army What Really

Was outfitting the entire U.S. Army in black berets

BY DIANE M. MERCURIO, ESQ. AND JAMES J. JANOSEK, ESQ.

For U.S. Department of Army's procurements, 2001 marked the year of the black beret. The top army military officer decided on October 17, 2000, that all army soldiers would wear the black beret by June 14, 2001. The Defense Logistics Agency (DLA) was tasked to execute the plan. To do so within the time frame provided to them, DLA had to waive the statutory requirements to fully compete the procurement and to buy American.

Sole source and non-American manufacturing orders were placed with foreign sources, including the Chinese. The army and DLA never foresaw the high level attention their actions would receive. Eventually, the army disposed of almost 1 million berets made in China at a total cost to U.S. taxpayers of \$6.5 million. *The Army Lawyer* gave the beret purchases "the dubious honor for the most

congressional scrutiny and notoriety" out of all 2001 procurements.¹ Two congressional hearings, two GAO investigations, and 917 articles in the press later,² one can now ask, so how and why did it happen?

The Debate

The much debated issue in the black beret incident was as follows. Was the requirement to outfit the entire U.S. Army in black berets by its first birthday in the new millennium really "an unusual and compelling urgency," or an emergency justifying DLA's purchases of berets made in South Africa, Romania, India, Sri Lanka, Canada, and China?

All purposes of this size that are not fully competed, of course, require a justification and approval under the Competition in Contracting Act, due to unusual and compelling urgency or some other justification.³ Further, any purchase of berets made outside of the United States requires a waiver of the Berry Amendment based upon an emergency or another justification that mandates that items of clothing, food, or wool (and other items) bought for the armed forces be produced in the United States.⁴

The Berry Amendment is not new to DLA—the statutory language has been included in various forms of legislation since 1941. The purpose of

the law is to ensure that military supplies are made of "100 percent American components" and produced in American factories whenever possible.⁵ A waiver of this long-standing law can be granted only if the secretary of the military department concerned determines that items of satisfactory quality and sufficient quantity cannot be acquired when needed from domestic suppliers at U.S. market prices. Until it was revoked as a result of the black beret procurement, waiver authority had been delegated by the service chiefs to certain positions, including officials at DLA.

The urgency in all this was the army's commitment, announced by the U.S. Army Chief of Staff General Eric K. Shinseki on October 17, 2000, to have all of its troops outfitted by June 14 of the following year, the service's first birthday in the new millennium.

DLA was merely acting in response to what it believed to be a valid requirement initiated by the top army military officer. General Shinseki had stated that the requirement was "symbolic of our commitment to transform this magnificent army into a new force—a strategically responsive force for the 21st century."⁶

DLA's actions to purchase headwear for U.S. Army soldiers produced in foreign countries, including China,

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y Black Berets— Happened?

by its first birthday of the millenium really an unusual and compelling urgency?

received mixed reviews.⁷ Congressional leaders and the media heavily criticized the agency's actions, waiving the two statutory requirements and its failure to rely more heavily on U.S. small business manufacturers.

Perhaps what really fueled the storm of criticism was the mid-air collision of a U.S. Navy EP-3 surveillance plane with "a Chinese fighter" on March 31, 2001, in which the U.S. government had to negotiate with the Chinese government to secure the release of the downed crew and the return of the U.S. Navy surveillance plane. The Chinese officials would not allow the United States to repair the plane on Hainan Island and fly it home. Instead, the Chinese officials agreed almost 60 days after the collision that the plane could be disassembled and returned to the United States in a "Russian AN-124 cargo plane. . . in pieces [which is] more costly and time-consuming."⁸ Thus, while public sentiment was justifiably in support of the U.S. government in negotiating with the Chinese, the DLA and the army were left trying to explain the necessity of waiving a "Buy American" statute. This was done just so the army would be outfitted in black berets by its first birthday in the new millennium—even if it meant many soldiers would wear berets manufactured in China.

Department of Defense (DOD) Pentagon officials have opined that, despite heavy scrutiny and even criticism, DLA's actions were indeed an appropriate response to their DOD customer's request.⁹ But, this was not without a price. DOD ended up with 925,000 berets manufactured in China and ultimately determined that the berets would not be distributed to U.S. Army soldiers and would therefore be disposed. To procure these 925,000 berets from a Chinese source cost the U.S. taxpayers \$6.5 million.

The General Accounting Office determined the following in its May 2001 report to the chairman of the House of Representatives Small Business Committee: "In their eagerness to serve the customer, DOD procurement officials chose to shortcut normal contracting procedures. . . . The imposition of June 14 deadline placed DOD in a high-risk contracting situation."¹⁰

In order to prevent similar occurrences in the future and to restore public confidence in its buying habits,

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DOD took steps in April 2001 to tighten internal approvals of Berry Amendment waivers by rescinding the prior delegation of authority. In addition, in September 2001, DLA identified four actions that contracting personnel could take:

- (1) Highlighting Berry Amendment restrictions in pre-proposal conferences;
- (2) Including in solicitations the full text of the Berry Amendment regulatory clause, not just a reference;
- (3) Making domestic source requirements a mandatory discussion item when conducting negotiated procurements; and
- (4) Emphasizing the ability to implement domestic source restrictions, when contractor purchasing systems are reviewed.¹¹

The irony in all of this is that, although it was the Chinese-manufactured berets that caused the most controversy in the media, in the end, the only berets that were delivered 100 percent within the contract period before the army's birthday were the very Chinese manufactured berets that were declared unusable by the army, and one other smaller lot by another foreign manufacturer.¹²

Even with all of DLA's efforts to satisfy the army requirement, the DLA contractors failed to meet DLA's delivery requirements and the Department of Army had to implement a phased in approach of its newest headwear. So, after all of both the army's and DLA's efforts amid the severe controversy, most army soldiers did not have the black beret in time for the army's first birthday in the new millennium. Thus, for army procurements, 2001 was indeed the year of the black beret.

While the DLA did everything required to purchase the berets on time to meet the demands of its army customer, these purchases demon-

strate that in this free and open society, the implications of the executive branch's actions must be fully considered. It is not sufficient to decide on a course of action merely on the basis that all legal requirements have been met. While it is not generally within the DOD procurement arena's responsibility to set policy or to take into account public perception, those in procurement must certainly consider policy implications and how Congress and the media will react.

In this instance, after recognizing the implications of the procurement actions taken to satisfy the June 14 deadline, DOD officials took the appropriate course of action to restore public confidence in its buying habits. Delegation of waiver authority was rescinded. Contracts for foreign-made berets were cancelled, and berets that were already bought were disposed. Heightened awareness of the Berry Amendment was directed. Two small business contracts were awarded to American companies for berets to be produced with domestic material.

The DOD recognized that its actions are always subject to public scrutiny and congressional oversight, which may indeed be exacerbated by current events. Yet, corrective action was promptly taken and the resilience of our government was demonstrated yet again. **CM**

Endnotes

1. *The Army Lawyer*, January/February 2002, at 76.
2. 917 hits were identified in a LEXIS/NEXIS search in the All Sources/News/News Abstract library for the year 2001 with the search terms "'black beret' and 'army'." There were 212 hits in the same library and year restriction for the search "'black beret' and 'China.'"
3. 10 U.S.C. Section 2304(c)(2). The army stated the basis for its unusual and compelling urgency was that "The army will be seriously injured if this action is not approved. [Proceeding] is imperative in order for [DLA] to support the service by its introduction date." See GAO Report-02-165, December 11, 2001, at 2.
4. The full text of the Berry Amendment can be found at 10 U.S.C. Section 2241 Note.

The relevant language is a waiver is possible "if it is determined that a satisfactory quality and sufficient quantity cannot be acquired as and when needed at U.S. market prices." DLA approved the Berry Amendment waivers for all foreign companies citing the June 14, 2001, deadline as the "emergency" for the waivers. *The Army Lawyer* at 77.

5. 43 *Government Contractor* 18 Paragraph 191 (May 19, 2001).
6. *The Army Lawyer* at 76 (quoting Gen. Shineski's address to the Association of the U.S. Army Convention, October 17, 2000).
7. Professor Schooner's comments on the beret procurements were, "Nothing prevented DLA and the army from taking the time they required to comply with the spirit of Congress' mandate. What was lacking here was patience, rather than prescience. . . . Better acquisition planning or, more specifically, more realistic definition of the army's actual requirements, could have avoided this situation." 43 *Government Contractor* 15 Paragraph 158 (April 18, 2001).
8. See DOD press news release titled "Navy EP-3 Plane to Come Home Disassembled," dated May 29, 2001, located on the internet at www.defenselink.mil/news/May2001/n05292001_2001105293.html.
9. See GAO Report-01-695T, at 3. The Pentagon official was the DOD's deputy general counsel for acquisition and logistics. After the legal review, it was determined that DLA actions to ratify the initial waivers of the Berry Amendment were appropriate. Further attached to the GAO Report-02-165, was a letter dated November 28, 2001, from Deidre A. Lee, director of defense procurement, DOD, to David E. Cooper, director, Acquisition and Sourcing Management, GAO, which states, a DOD review in March 2001 "found no basis to fault the manner in which DLA addressed the application of the Barry Amendment."
10. GAO Report-01-695T at 4.
11. GAO Report-01-695T at 7.
12. The other smaller lot consisted of 240,000 berets delivered by C.W. Headdress in Sri Lanka.

The Step-by-Step Play

October 17, 2000—U.S. Army chief of staff announces that all active, national guard, and reserve personnel would be issued black berets as part of their standard headgear. He further announces that army personnel would begin wearing the new berets on June 14, 2001.¹

November 1, 2000—DLA signs internal justification and approval permitting sole source awards to satisfy the black beret requirement.²

November 1, 2000—Deputy commander of DLA's Defense Supply Center-Philadelphia approves the first waiver (or domestic non-availability determinations) to the Berry Amendment.

November 2, 2000—DLA awards non-competitive contract to Canadian manufacturer, Dorothea Knitting Mills, for 1,083,504 million black berets, to be made in Canada at a price of \$7.20 each for a total price of \$7.8 million.³

November 6, 2000—DLA issues a non-competitive contract to Denmark Military Equipment Company for 480,818 black berets to be made in Romania at a price of \$5.75 each, for a total price of \$2.8 million.⁴

November 8, 2000—DLA modifies its current contract with a U.S. company, Bancroft Cap Company of Cabot, Arkansas, to increase the government quantity by 1.2 million at a price of \$6.30 each for a total price of \$7.6 million. The Bancroft Cap Company manufactures the Army Ranger's knit black berets.⁵

December 7, 2000—Deputy commander of DLA's Defense Supply Center-Philadelphia approves the second waiver to the Berry Amendment.

December 7, 2000—DLA awards four contracts to non-U.S. companies for berets to be manufactured in China, India, South Africa, and Sri Lanka.⁶

Prices range from \$4.36 to \$6.24 per beret, the highest price being paid to Kangol, LTD, the contractor who would manufacture the berets in China.

February 13, 2001—DLA's senior procurement executive approves the third waiver to the Berry Amendment.⁷

February 14, 2001—DLA exercises contract options for more berets to be manufactured in South Africa and Sri Lanka. The South African manufactured berets include content from China.

February 22, 2001—DLA exercises contract options for more berets to be manufactured in India and China. The additional beret purchase from Kangol, LTD, is for 308,968 berets at a price of \$6.68 each, the highest price paid for any beret, except for those purchased from the Canadian manufacturer, at a total price of \$2.1 million.⁸

March 16, 2001—General Shinseki and Deputy Defense Secretary Paul Wolfowitz announce at the Pentagon that one of the army's most elite units, the Rangers, who traditionally had been the only soldiers to wear black berets, would retain their distinctive identity by being outfitted in tan berets. This was considered a compromise after a march on the mall in Washington, D.C., by former Rangers protesting the army's decision to extend the revered black beret to all army soldiers.⁹ To some, the black beret had "become a powerful symbol of excellence earned only through extreme effort under adverse conditions."¹⁰

March 23, 2001—DLA's senior procurement executive ratifies the earlier approvals issued by the deputy commander in Philadelphia.¹¹

March 31, 2001—U.S. Navy EP-3 "surveillance plane collided mid-air with a Chinese fighter" and made an emergency landing on Hainan Island.¹² The crew of 24 men and

women would be held by the Chinese until April 11, 2001, on Hainan Island.

April 4, 2001—The Pentagon cancels a news conference announcing its results of a review of the contracts.

April 5, 2001—House Small Business Committee postpones a hearing on the Pentagon's decision to award contracts to foreign manufacturers of black berets.¹³ According to The Washington Post, the White House had asked for delays in both the news conference and congressional hearing, so as not to risk interfering with the negotiations for the release of the 24 crew members and the return of the navy surveillance plane held on Hainan Island.¹⁴

April 2001—Bernard Cap Company, contractor of berets manufactured in South Africa with Chinese content, delivers 188,636 berets at a price of \$1.9 million.

April 2001—Kangol LTD, contractor of berets manufactured in China, delivers all 617,936 berets on order on time at a price of \$4.5 million. It was "Kangol's participation [that] caused the most controversy in light of the prolonged standoff between the United States and China over [the] downed navy surveillance plane."¹⁵

April 11, 2001—DOD Secretary Rumsfeld issues a press news release stating, "Arrangements for the return of the 24 men and women of the U.S. Navy EP-3 are moving forward. . . . Issues relating to the release of the EP-3 aircraft are still being discussed [with China]."¹⁶

April 11, 2001, 8:50 p.m.—Rear Admiral Craig Quigley, deputy assistant secretary of defense (PA), conducts a live briefing announcing the return of the 24 members of the aircrew from Hainan Island to the United States. He states, "The [surveillance] plane was operating in

international airspace. . . [It] is U.S. property, and we want it back." With the crew back, "the Chinese have said that they wish to make [the plane and future flights] an element of discussion during the talks" that will start on April 18 between the United States and China.¹⁷

April 24, 2001—Principal deputy under secretary of defense (acquisition, technology, and logistics) cancels the delegation of authority previously granted to the DLA director and senior procurement executive. The cancellation was issued to ensure that any request for a waiver to the Berry Amendment "receives attention at an appropriate level within the Department of Defense."¹⁸

May 1, 2001—Deputy secretary of defense, noting the army chief of staff's decision that U.S. troops will not wear berets made in China or made with Chinese content, directs that appropriate action be taken to "recall previously distributed berets" and dispose of the 925,000 black berets valued at \$6.5 million.¹⁹ Further, he issues a memorandum underscoring the requirements of the Berry Amendment and directing that the authority for waiving the requirements could not be delegated below the under secretary of defense (acquisition, technology, and logistics) or the secretaries of the U.S. Army, Navy, and Air Force.

May 2, 2002—The House Small Business Committee holds a hearing, previously postponed due to the "spy plane incident" to determine whether the army had violated the Berry Amendment.²⁰ The army announces to congressional leaders that the Chinese-made berets will be disposed of as surplus property and reprocedured from domestic sources.²¹

May 2, 2001—Army spokeswoman says the army will move to a new "phased implementation" plan. All troops should be sporting the black berets by the end of 2002.²²

May 2001—DLA terminates three

contracts because of failure to deliver berets on time.²³

May 29, 2001—The Pentagon announces that the Chinese have agreed to return the damaged Navy EP-3 plane they have held since March 31 in pieces. The United States had sought to repair the plane on Hainan Island and fly it home, "but the Chinese rejected the idea."²⁴

June 14, 2001—The army's first birthday in the new millennium.

August 2001—DLA agrees to two small business set-aside contracts worth \$50 million to supply 3.9 million berets to the army. The contracts will include options to extend production by another seven million berets over three years. This procurement news referenced as being "far more palatable to Congress and the American public."²⁵ September 2001 DLA sends guidance to its buying activities to heighten Berry Amendment awareness.²⁶

Mid-October 2001—1.6 million berets are still due under existing contracts.²⁷

September 2002—DLA expects to have all berets delivered.²⁸

October 2003—DLA hopes to complete distribution of two berets to all army and national guard personnel.

1. *GAO Report-01-695T* at 2.
2. Testimony of Michele I. Goodman, president of Atlas Headwear, Inc. before the U.S. House of Representatives Hearing on April 5, 2001.
3. *Id.* See also *GAO Report-01-695T* at Appendix 1.
4. *Id.*
5. *Id.*
6. *Id.*
7. *GAO Report-01-695T* at Appendix II.
8. *Id.* at Appendix I.
9. *The Washington Post*, April 6, 2001, at A35. See also DOD press advisory titled "Wolfowitz, Shinseki to brief today on Army Headgear," dated March 16, 2001, located at

www.defenselink.mil/news/Mar2001/p03162001p049-01.html.

10. Taylor, Brad. "Bush Orders Review of Beret Purchases from China," at *SuppressedNews.Com*.
11. *GAO Report-01-695T* at 3.
12. See DOD press news release titled "Navy EP-3 Plane to Come Home Disassembled," dated May 29, 2001, located at www.defenselink.mil/news/May2001/n05292001_2001105293.html.
13. "U.S.-China Tension Delays Hearing on Berets." *The Washington Post*, April 6, 2001, at A35.
14. *Id.*
15. *The Army Lawyer*, at 76 fn. 969.
16. See DOD press advisory titled "Wolfowitz, Shinseki to brief today on Army Headgear," dated March 16, 2001, located on the internet at www.defenselink.mil/news/Mar2001/p03162001p049-01.html.
17. See DOD press news release titled "Secretary Rumsfeld on Return of EP-3 Crew," dated April 11, 2001, located on the internet at www.defenselink.mil/news/Apr2001/b04112001bt154-01.html.
18. *GAO Report-01-695T* at 3.
19. *GAO Report-01-695T* at 3-4. See also "Army Drops Plan to Buy Berets in China," *The Washington Post*, May 2, 2001, at A08 (quoting Deputy Defense Secretary Paul D. Wolfowitz May 1, 2001, statement).
20. 43 Government Contractor 18 paragraph 191 (May 9, 2001).
21. *Id.*
22. *The Washington Post*, May 2, 2001, at A08.
23. *GAO Report-01-695T* at 3 (the three specific termination dates are unavailable).
24. See DOD press news release titled "Navy EP-3 Plane to Come Home Disassembled," dated May 29, 2001, located at www.defenselink.mil/news/May2001/n05292001_2001105293.html.
25. *The Army Lawyer*, at 77 (citing BNA Fed. Cont. Rep. (Aug. 21, 2001)).
26. *GAO Report-01-695T* at 7.
27. *GAO Report-01-695T* at 3.
28. Due to publication deadlines, the total number of berets delivered by this September 2002 end date was not known before this article went to print.